No. 10-876

In the Supreme Court of the United States

JUNE O. CARLSON,

Petitioner,

v.

SCOTT BUKOVIC and
CITY OF DARIEN, ILLINOIS,
an Illinois Municipal Corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

ARTHUR G. JAROS, Jr.
Counsel of Record
THE LAW OFFICE OF
ARTHUR G. JAROS, JR.
1200 HARGER ROAD, #830
OAK BROOK, IL 60523
(630) 574-0525
agjlaw@earthlink.net

Counsel for Petitioner

February 21, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890 5001

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ARGUMENT

Respondents' Brief does not contest the key assertions of Carlson's Petition that:

- Respondents' Response to Carlson's Statement of Facts supporting her summary judgment motion admitted every allegation regarding Bukovic's seizure of petitioner and absence of probable cause (Petition, pp. 17, 29);

- Bukovic admitted applying two levels of physical contact to enforce his directive that Carlson leave the store upon pain of arrest for criminal trespass (Petition, pp. 8, 9);

- Bukovic admitted submitting to his department his report (Petition Appendix F) which admitted using injurious force;

- the panel's Opinion suppressed any reference to that Appendix F admission (Petition, p. 30);

- Bukovic lacked probable cause under Illinois' criminal trespass statute which decriminalized remaining in buildings open to the public during normal business hours (Petition, pp, 11, 12);

- Carlson was denied procedural due process of law per the third Question Presented and its supporting argument (Petition, pp. 28-32).[1]

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[1] Respondents (p.2) groundlessly allege: "The Seventh Circuit viewed the facts in the light *most favorable* to Bukovic ... " In truth, the panel denied Carlson fair appellate review and

RESPONDENTS' RESPONSE TO QUESTION 2 AND THE SUPPORTING ARGUMENT (Petition, pp. 25-28) CONFIRMS IMPORTANT QUESTIONS OF FEDERAL LAW WERE DECIDED IN A MANNER CONFLICTING WITH THIS COURT'S DECISIONS.

Respondents' Brief confirms that, in adopting their Fourth Amendment understanding, the courts below have stood Fourth Amendment jurisprudence on its head. Unless certiorari review is granted, a legal cancer will be injected into this vital part of the American constitutional fabric which protects American citizens from abuse at that hands of officials entrusted with the powers and duties of law enforcement.

A) THE COURTS BELOW VIOLATED ESTABLISHED CONSTITUTIONAL PRECEDENTS IN RULING THAT THE THEORY OF *PER SE* UNREASONABLE SEIZURE FOR WANT OF PROBABLE CAUSE IS AVAILABLE ONLY IN THE CONTEXT OF FALSE ARREST.

Respondents' Brief, p. 9, purporting to cite to Petition, p. 19, reads: "Petitioner wants this Court to adopt a rule whereby no officer could use any force *on*

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procedural due process of law by not so viewing the facts but rather by impermissibly *spinning the record more favorably* to Bukovic than the facts admitted by him allow (Petition pp. 28-31, (unrebutted)).

a non-arrestee (unless, later, a determination of probable cause is made)."[2] Continuing,

> Petitioner simply fails to understand the implication of ... her admitted failure to plead a Fourth Amendment *false arrest* claim. *** [T]he appellate court directly addressed the petitioner's misstatement and misunderstanding of Fourth Amendment excessive force claims (versus Fourth Amendment *false arrest* claims) (Response, p. 8).
>
> [A]s the Seventh Circuit quoted petitioner's counsel, the formulation of this purported claim would render an officer constantly liable for any touching of an individual *that was not arrested* 'no matter how brief' if the officer did not have probable cause to arrest the individual. Petition, p. 13a (quoting Carlson's counsel[3]). This is

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[2] This statement is correct but for three important details. First, as expressly set forth at Petition, p. 19 and in Carlson's Briefs below, the phrase "could use any force" as formulated by Carlson reads "could use any force *for law enforcement purposes* ..." (Petition, p. 19, "he admitted each and every allegation pertaining to respondent's seizure of petitioner under color of authority *for law enforcement purposes*.") Second, as discussed herein, Carlson recognizes the *Terry v. Ohio* protective seizure and weapons search exception to the probable cause requirement. Third, as also explained herein, this Court has already adopted the rule opposed by Respondents and disregarded by both courts below.

[3] The panel's Opinion, in truth, wasn't "quoting Carlson's counsel." Carlson's counsel never took that position (*see*, Petition, p. 31, point (C)). Carlson's actual verbatim argument was: "On the undisputed facts of this case, Defendant Bukovic Committed a Per Se Unreasonable Seizure If he Lacked Probable Cause to

simply not a correct statement of law. *See*, Petition, p. 21a-22a fn. 19 (dismissing theory) The Seventh Circuit discussed the appropriate use of force by an officer on a *non-arrestee* in its opinion ...." (Response, p. 9).

Instead of responding to the decisions of this Honorable Court and lower courts (at Petition, pp. 27, 28), which establish that a seizure--not made for the purpose of permitting the officer to make a *Terry* self-protective pat-down search and not backed by probable cause--is *per se* unreasonable *irrespective of whether an arrest is actually made*, Respondents, employing circular reasoning, rely exclusively upon two portions of the panel's decision to argue the correctness of that decision! In actuality, Respondents and both courts below lost track of this Court's key and plainly explicated constitutional jurisprudence. Fourth Amendment seizures are found "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen" (*Graham v. Connor*, 490 U.S. at 395). *Terry v. Ohio* affirmed that "[w]e do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizure through the warrant process ... or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances." (392 U.S. at 20). *Terry* held that a non-arrest seizure wasn't *per se* unreasonable, despite

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Believe Plaintiff Was Engaged in the Commission of a Criminal Offense because he admits giving a command *for law enforcement purposes* aimed at removing the Plaintiff from a retail store, and enforcing that command with objected-to physical contact with Plaintiff's person which the Defendant Officer admits physically injured the Plaintiff." (Appellant's Brief, p. 27).

the absence of probable cause to justify either seizure or an arrest, by laying down this exception to that usual requirement of probable cause: that a protective seizure and search for weapons of a person who the officer believes may be connected with criminal activity and who the officer, in questioning as part of a criminal investigation, has reason to believe, based upon specific and articulable facts and rational inferences therefrom, is an armed and dangerous individual doesn't constitute an unreasonable seizure *per se*. Apart from the probable cause requirement and the *Terry* exception, the Fourth Amendment "proceeds as much by limitation upon the scope of governmental action *as by imposing preconditions upon its initiation*." (392 U.S. at 28, 29). The decisions below obliterate critical Fourth Amendment *preconditions* upon Bukovic's initiation of governmental action for law enforcement purposes against Carlson's person as an elderly female citizen by throwing out, in a gross error of constitutional law, the requirements of probable cause (or the *Terry* exception) and substituting an *ad hoc* rule of reasonable degree of force in any circumstances of an officer's own choosing so long as he decided to refrain from making an arrest.

B) RESPONDENTS ERR IN VIEWING *PER SE* UNREASONABLE SEIZURES AS A SUBSET OF EXCESSIVE FORCE CLAIMS.

Respondents (pp. 8, 7) argue:

> Petitioner maintains ... that her alleged claim for "*per se* unreasonable seizure" falls under the rubric of a Fourth Amendment excessive force claim. *** .

> Her theory of a "*per se* unreasonable force" simply misstates Fourth Amendment claims of excessive force ... .

Respondents misunderstand Carlson's position and Fourth Amendment jurisprudence: Carlson hasn't described her "*per se* unreasonable seizure" claim as being a subset of an excessive-degree-of-force claim but rather as an independent theory of unreasonable seizure; neither did the panel below (*see*, footnote 19 at Petition, 21a).

C) RESPONDENT AND THE COURTS BELOW ERRED AS A MATTER OF ESTABLISHED FEDERAL CIVIL PRACTICE IN BARRING CARLSON FROM BEING HEARD ON THE MERITS, EITHER AT SUMMARY JUDGMENT OR AT TRIAL, OF HER *PER SE* UNREASONABLE SEIZURE THEORY.

Respondents (pp. 1, 7) state:

> Count I put Bukovic on notice that he was defending himself against a claim of excessive force.
>
> It is apparent that petitioner misunderstands the nature of the Fourth Amendment excessive force claims she alleged ...

The import of these statements is that Bukovic claims he was put on notice of *only* one of two legal theories presented by Carlson to the courts below such that Carlson is limited only to an excessive-degree-of-force claim of unreasonable seizure and cannot be heard on her *per se* unreasonable claim of unreasonable seizure,

even though the panel correctly acknowledged: "Throughout the district court proceedings, Ms. Carlson maintained that she was 'seized as a matter of law' and that the seizure was '*per se* unreasonable.'" (Petition, p. 13a).

Both courts below erred in refusing to allow Carlson to raise her claim that Bukovic committed a *per se* unreasonable seizure of her person for want of probable cause because a false arrest claim wasn't present (*see*, Point A, *supra*). But Respondents and the courts below also disregard established rules of federal civil practice:

Respondents tellingly ignore that the Complaint specifically alleged that Carlson was not committing any crime and that the City had failed to train Bukovic "in his handling of non-criminal matters, especially those involving elderly women." (Petition, p.11). Respondents also don't rebut that the Complaint never utilized the term "excessive force" (Petition, p. 11); hence, suggesting, as the panel did (Petition, p. 2a), that Carlson was proceeding on only the excessive-degree-of-force theory of unreasonable seizure is untenable. Instead, the Complaint expressly described the claim against Bukovic as being for an "unreasonable seizure" of Carlson's person. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." (*Conley v. Gibson*, 355 U.S. 41 at 48 (1957)).

The courts below disregarded and violated plainly established precedent of the Seventh Circuit Court of

Appeals: "The point of a notice pleading standard is that the plaintiff is not required to plead ... *legal theories*." (*Hefferman v. Bass*, 467 F.3d 596 at 599 (7th Cir. 2006)). The contrary import of Respondents' statements– namely, that because Carlson's Complaint didn't expressly use the words "*per se* unreasonable seizure," she's barred from presenting that theory, both at summary judgment and at trial–borders on the preposterous.

D) RESPONDENTS' BRIEF (p. 9) CONFIRMS THAT THE PANEL BELOW REINVENTED THE TEST OF "SEIZURE" IN DEFIANCE OF THE TEST ESTABLISHED BY THIS COURT IN *FLORIDA v. BOSTICK*, *TERRY v. OHIO* and *DELAWARE v. PROUSE* and the SEVENTH CIRCUIT'S COMPATIBLE DEFINITION IN *ACEVEDO v. CANTERBURY*

Terry v. Ohio (Petition, pp. 25, 26), clearly describing the non-arrest fact pattern of the instant case, states:

> *It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime*–'arrest' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he *has*[4] 'seized' the person. 392 U.S. at 16

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[4] not "*may have* seized"

Bukovic admitted (Petition, pp. 7, 8) Carlson wasn't free to walk away elsewhere in the Wal-mart store or even a few feet to sit down next to her injured son as he worked on his accident report.

The panel below defied the law of evidentiary admissions and this Court's test of seizure by insisting, through what Respondents call a "common-sense statement" (Brief, p. 9), that a determination of seizure can *never* be made by a trial court as a matter of law but rather that such determinations necessarily involve speculation reserved for the finder of fact:

> Officer Bukovic's contact with Ms. Carlson's arm ***may have been*** so light and so momentarily that it did not convey ... a demonstration of anything more than an encouragement that she leave .... We must remember that police officers find themselves in a myriad of contentious, and potentially explosive, situations where in an effort to defuse the situation, a combination of verbal declarations and gestures must be employed. When considered in context, such actions ***may be*** more exhortatory than commanding ... . (Petition, p. 19a)

In adopting this speculation test ("may have been"; "may be"), the panel refused to examine the actual record of admissions by Bukovic which conclusively shows that the speculation standard adopted by the panel had no connection to the reality of the situation as acknowledged by Bukovic himself and constituted a refusal by that panel to review the facts of the case in light of the just-quoted definitive, non-speculative test laid down in *Terry v. Ohio* (*see*, footnote 4)

Bukovic himself admitted he wasn't in a potentially explosive situation with an unarmed, octogenarian women. She merely wanted to remain inside a store she had rightfully entered to assist her injured, disabled adult son and finish shopping.

E) RESPONDENTS' ERROR RE: *GRAHAM v. CONNOR*'S APPLICATION

Respondents (p. 8) argue: "It seems that petitioner is seeking to have this Court abandon ... the analysis of *Graham v. Connor* in Fourth Amendment *excessive force cases*." (emph. added). Respondents forget that the plaintiff citizen Graham hadn't alleged that the defendant officer lacked probable cause; therefore Graham hadn't made a claim that his seizure was *per se* unreasonable; instead this Court's Opinion makes clear that the sole theory presented was an "excessive force" claim which this Court determined was cognizable as an unreasonable seizure under the Fourth Amendment, not a substantive due process claim (490 U.S. at 395). That Opinion recognizes both Fourth Amendment theories of unreasonable seizure:

> The Fourth Amendment is not violated by an arrest *based on probable cause* ... With respect to a claim of *excessive force, the same standard* of reasonableness at the moment applies ..." (490 U.S. at 396)

Notwithstanding *Graham v. Connor* being exclusively an excessive force case, the first sentence just quoted is the Court's recognition of its established line of cases holding that arrest (or other seizure) not based on probable cause (or, as not relevant here, the *Terry* protective search exception to the probable cause

requirement) is *per se* unreasonable under the Fourth Amendment.

GIVEN THE SPECIFIC AND SIGNIFICANTLY DIFFERENT ADJUDICATIVE PATTERN IN *ORTIZ v. JORDAN*, THIS COURT'S RULING THEREIN ONLY PARTIALLY RESOLVES THE SPLIT BETWEEN THE CIRCUITS RE: REVIEWABILITY OF ANY AND EVERY DENIAL OF SUMMARY JUDGMENT (Question 1 and Supporting Argument at Petition, pp. 15-25)

Respondents (p. 2) trumpet: "This Court's January 24, 2011 ruling in *Ortiz v. Jackson* (sic) ... ends petitioner's case. Petitioner's appeal of the denial of her summary judgment motion after there has been a trial is no longer possible ...."

Even if Respondents' view that *Ortiz* precludes appellate review of the denial of Carlson's summary judgment motion were correct, they overlook that Carlson's Petition to this Court is based upon two other independent reasons:

(1) Per Petition, p.14, the courts below (in pretrial rulings and affirmance thereof upon jury instructions and special verdict forms and the grant of Bukovic's Motion in Limine) refused to permit Carlson to proceed to jury trial on the theory of *per se* unreasonable seizure for want of probable cause. These pretrial rulings repeated the errors made in the rulings upon (and appellate review of) the denial of Carlson's summary judgment motion against Bukovic and are reviewable as questions of law notwithstanding the absence of Rule 50 motions.

(2) Question 3 and its unrebutted supporting argument likewise stand, irrespective of reviewability of summary judgment denial.

As to *Ortiz*, Respondents fail to address its distinguishing features (Petition, pp. 22, 23).

The material facts of immunity in *Ortiz* were genuinely in dispute when summary judgment was denied the defendant. In contrast, Bukovic admitted every summary judgment allegation of *material* fact bearing on seizure and lack of probable cause (*see*, Statements 59-69.1 of Appendix G). Neither court actually determined there were *material* issues of fact warranting denial of Carlson's summary judgment motion. The District Court merely states "[t]here is a *question of fact*[5] as to the nature of the physical interaction between Plaintiff and ... Bukovic." (p. 47a) Given Bukovic's admissions of Statements 59-69.1 of Appendix G, the trial court was apparently looking at the dispute on the face of the pleadings over the degree of force Bukovic used which dispute wasn't present in the parties' submissions re: Carlson's motion for summary judgment. That dispute *wasn't material* to Carlson's motion for summary judgment predicated on the *per se* unreasonable theory of unreasonable seizure. Similarly, the panel never considered what facts were *material* to Carlson's *per se* unreasonable theory of commission of an unreasonable seizure by Bukovic; instead the panel wrote: "Ms. Carlson's version of the facts, *described in her motion*, was very different from the version described by the defendants." (p. 6a) This statement was untrue (*see*,

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[5] rather than "a question of *material* fact"

Appendix G) but likewise might be referencing the pleadings dispute. The panel's just-quoted observation confirms it never determined that an issue of *material* fact over Carlson's *per se* unreasonable seizure theory actually was presented by the summary judgment submissions.

In *Ortiz*, the officer was allowed to re-present his immunity defense at trial. *Ortiz* also held that a defendant's failure to make Rule 50 motions is fatal to appellate review but only after this Court *independently* (i.e., at ¶5 of footnote 6) determined through *de novo* review that the District Court had properly found genuine issues of *material* fact present at summary judgment. In contrast, Carlson was barred from re-presenting at trial her *per se* unreasonable seizure claim. Therefore, her forgoing of Rule 50 motions at trial of her excessive-degree-of-force claim shouldn't affect appellate review of either denial of summary judgment grounded upon her other Fourth Amendment theory (*per se* unreasonable seizure for want of probable cause) or rejection of her related jury instructions and the correlative grant of Bukovic's Motion in Limine which kept that theory from being tried.

Respondents (pp. 5, 6) challenge Carlson's statement (Petition, top p. 18) that she wasn't afforded *de novo* review *of the summary judgment record*. Contrast the *Ortiz* opinion's *de novo* review through specific enumeration of disputed summary judgment facts with the panel below's abject failure to *identify* any issues of material fact present on the face of the parties' actual summary judgment submissions. Reviewing Appendix G reveals the panel failed to identify any because not one such issue existed.

CONCLUSION

Wherefore, June Carlson respectfully requests that the Court reject Respondents' arguments and grant her relief.

Respectfully submitted,

Arthur G. Jaros, Jr.
Counsel of Record
The Law Office of
Arthur G. Jaros, Jr.
1200 Harger Road, #830
Oak Brook, IL 60523
(630) 574-0525
agjlaw@earthlink.net

Counsel for Petitioner

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APPENDIX G

12045

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No.: 07 C 0006

[Filed April 25, 2008]

JUNE O. CARLSON	)	
	)	
Plaintiff,	)	
	)	
v.	)	Magistrate Judge Nolan
	)	
SCOTT BUKOVIC, and the CITY OF DARIEN, an Illinois Municipal Corporation,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS SCOTT BUKOVIC AND CITY OF DARIEN'S 56.1(b)(3) RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS

NOW COME Defendants, SCOTT BUKOVIC and the CITY OF DARIEN, by and through their

attorneys, James L. DeAno, Laura L. Scarry and Scott Dolezal of DeANO & SCARRY, and pursuant to Local Rule 56.1(b)(3) hereby submit the following Response to Plaintiff's Statement of Facts in Support of Her Motion for Summary Judgment:[1]

Parties and Jurisdiction

1. At all times relevant to her complaint, Plaintiff, June Carlson, was a citizen of the United States of America, residing in the Village of Hinsdale, DuPage County, Illinois. See, Complaint at ¶ 3, Dckt. 1, attached to Defendants' Statement of Facts as Exhibit A. At the time of the incident, Plaintiff was 83 years old. Id.

Response: Admit.

2. Defendant, Officer Scott Bukovic, was at all relevant times employed by the City of Darien as a police officer. Complaint, ¶ 4.

Response: Admit.

3. Defendant, City of Darien, is an Illinois Municipal Corporation and at all relevant times was an employer of Defendant, Scott Bukovic. Complaint, ¶ 5.

Response: Admit.

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[1] Plaintiff's Rule 56.1(a)(3) Statement of Facts mirrors Defendants' Cross-Rule 56.1(a)(3) Statement of Facts with some minor exceptions. Even so, to prevent confusion, Defendants chose to follow Local Rule 56.1(b)(3) to the letter by admitting and denying Plaintiff's Rule 56.1(a)(3) Statement of Facts.

4. Jurisdiction is proper because this is a civil action to redress alleged violations under the Fourth and Fourteenth Amendments of the United States Constitution and under the civil rights laws of the United States of America, specifically, 42. U.S.C. § 1983. Complaint, ¶ 1.

Response: Admit.

Material Facts

5. On January 3, 2005, June shared a residence with her adult son, Paul, in Hinsdale, IL. June Carlson ("June"), dep. tr. 6-7, attached to Defendant's Statement of Facts as Exhibit B. At that time, Paul was 59 years old. Paul Carlson ("Paul"), dep. tr. 7, attached to Defendant's Statement of Facts as Exhibit C.

Response: Admit.

6. [Not Used]

7. On June 3, 2005 at approximately 3:00 p.m., June and Paul went shopping at the Wal-Mart store located in Darien, IL. June, dep. tr. 14; Paul, dep. tr. 12-13. Paul drove his truck to the store. Paul, dep. tr. 13, 106.

Response: Admit.

8. After arriving at the Wal-Mart store, June and Paul separated to shop for their own items. June, dep. tr. 15; Paul, dep. tr. 13-14. After shopping for his items, Paul started to look for his mother. Paul, dep. tr. 14.

Response: Admit.

9. As he was pushing his cart, his arm brushed up against a fire hose box that had a sharp edge exposed on the bottom corner of the box. Paul, dep. tr. 14-15. As a result, Paul received a cut on his arm. Paul, dep. tr. 14.

Response: Admit.

10. Paul wanted to find a manager to report the accident. Paul, dep. tr. 15. He located an assistant manager, Dale Hardick. Paul, dep. tr. 15-16; Dale Hardick ("Hardick"), dep. tr. 9, 12-13, attached to Defendant's Statement of Facts as Exhibit D. Paul told Hardick about his injury and brought him to the fire hose box to show him what happened. Paul, dep. tr. 16.

Response: Admit.

11. After viewing the fire hose box, Hardick brought Paul back to the personnel office located near the layaway area. Paul, dep. tr. 17-18; Hardick, dep. tr. 17; Sue Katsaros ("Katsaros"), dep. tr. 15-18, attached to Defendant's Statement of Facts hereto as Exhibit E.

Response: Admit.

12. Hardick told the personnel manager, Sue Katsaros, that Paul had scratched his arm. Katsaros, dep. tr. 19. Hardick began to complete a report of the accident by obtaining the information from Paul. Paul, dep. tr. 20; Katsaros, dep. tr. 19-20.

Response: Admit.

13. Brandon Hunter, the co-manager for the Wal-Mart store, had been notified of the incident and went to the personnel office. Brandon Hunter ("Hunter"), dep. tr. 15-19, attached to Defendant's Statement of Facts as Exhibit F; Paul, dep. tr. 17. After speaking with Hardick, Hunter spoke with Paul about what happened. Paul, dep. tr. 17-18. After telling Hunter what happened, Paul insisted on speaking to the store manager. Paul, dep. tr. 18-19.

Response: Admit.

14. Paul also wanted his mother with him. He was concerned that the communication between him and Wal-Mart personnel would be difficult because he is hard-of-hearing. Paul 22-24. He did not have his hearing aids with him at the time due to dampness caused by the weather. Id. He thought his mother would be able to assist with communicating with Wal-Mart personnel. Id.

Response: Admit.

15. As June was shopping, she received a page over the intercom. Katsaros, dep. tr. 23-24; Paul, dep. tr. 24; June, dep. tr. 15.

Response: Admit.

16. In the meantime, Katsaros had attempted to administer first aid to Paul's cut. Paul, dep. tr. 25; Katsaros, dep. tr. 21-22. There was a first aid kit in the personnel office. Katsaros, dep. tr. 22.

Response: Admit.

17. Paul did not like the first aid kit because it was kept in a white plastic storage box. Paul, dep. tr. 26- 27. In his opinion, it was not a typical first aid kit and looked like "junk" and a "mess". Id.

Response: Admit.

18. Paul informed Hunter that he was allergic and diabetic (Paul, dep. tr. 27). However, according to Paul, Katsaros began to clean his arm with iodine. Paul, dep. tr. 27-28, esp 28, line 1. Paul is allergic to iodine. Id. Katsaros, however, claims she did not place any iodine on Paul's arm. Katsaros, dep. tr. 30-31. Katsaros either offered or placed a Band-Aid on his cut. Katsaros, dep. tr. 22; Paul, dep. tr. 28.

Response: Admit.

19-22. [Not Used]

23. Stacey Johnson was the store manager at the time of the accident. Stacey Johnson ("Johnson"), dep. tr. 12-13, attached to Defendant's Statement of Facts as Exhibit G. After being notified of the incident, she went to the personnel office where Hardick was sitting at a table with Paul obtaining information from him. Johnson, dep, tr. 19; Katsaros, dep. tr. 20.

Response: Admit.

23-40. [Not Used]

41. At some point, while Johnson was speaking to June, Paul looked up and rose from his chair. Although he could not understand what Johnson was saying to June, Paul told Johnson, "Don't you talk that

way to my mom." Paul, dep. tr. 48-49; June, dep. tr. 36. Paul's voice was firm. June, dep. tr. 38. Johnson and Paul were only standing two feet apart with Paul in the customer area in front of the service counter. Johnson, dep. tr. 43. Paul, dep. tr. 52. Paul claims he pointed his finger downward and Johnson claims he pointed his finger at her. Paul dep. tr. 49-52, esp 51; Scott Bukovic ("Bukovic"), dep. tr. 48, attached to Defendant's Statement of Facts as Exhibit J; Bukovic police report # 05-46 ("police report"), attached to Defendant's Statement of facts as Exhibit K. Paul took a step in the direction of the counter and of Johnson (ibid).

Response: Admit.

42-44. [Not Used]

45. Paul did not cross over (i.e., go behind) the counter. Paul, dep. tr. 51-52. When Paul stepped forward, Johnson stepped back. Paul, dep. tr. 52-53 and Paul, in turn, stepped back, Paul, dep. tr. 52. Johnson had been or ended up behind the counter, Johnson dep. tr. 44; Paul, dept tr. 52. Johnson said that she was going to notify the police. Paul, dep. tr. 53. June told Johnson, "Go ahead and call the cops." Paul, dep. tr. 56.

Response: Admit.

46-47. [Not Used]

48. One of the Wal-Mart employees notified the Darien Police Department, Hunter, dep. tr. 33; Johnson, dep. tr. 36; Katsaros, dep. tr. 37-38. While they were waiting for the police, June continued to

speak loudly. Johnson, dep. tr. 49. Within moments, two uniformed male Darien police officers responded to the Darien Wal-Mart store. Johnson, dep. tr. 47-48; Paul, dep. tr. 57.

Response: Admit.

49. Officer Scott Bukovic and Officer Richard Stutte had been dispatched to the store around 4:52 p.m. Bukovic, dep. tr. 31-32; Richard Stutte ("Stutte"), dep. tr. 10-11, attached to Defendant's Statement of Facts as Exhibit L. They received a call of a disturbance involving a male and a female being loud or argumentative. Id.

Response: Admit.

50. Both officers responded to the layaway department. Bukovic, dep. tr. 34; June 42-43. Officer Bukovic was the primary responding officer because the Wal-Mart was in his beat.Officer Stutte was Officer Bukovic's back-up officer. Stutte, dep. tr. 14-16. When they arrived, Johnson, Hunter, and the Carlsons were in the layaway department. Bukovic, dep. tr. 38-39.

Response: Admit.

50.1 Officer Bukovic acknowledges that, upon the officers' arrival at the scene, he observed June Carlson to be calm (Bukovic dept r. 37, 45, 55).

Response: Admit, but further adds that only p. 55 (and not pp. 37 & 45) of Officer Bukovic's deposition transcript supports Plaintiff's assertion.

51. Officer Bukovic asked Johnson what the problem was. Bukovic, dep. tr. 41, 44; Johnson, dep. tr. 57. Johnson attempted to explain what had happened up to this point. Johnson, dep. tr. 57; June, dep. tr. 43. Johnson told Officer Bukovic that Paul had injured himself at the store and that during the process of completing a report for over an hour, Paul had become very loud and boisterous toward Johnson and pointed his finger at her. She also said that she felt threatened by Paul. Bukovic, dep. tr. 44-46.

Response: Admit.

52. [Renumbered as 53.1]

53. When Johnson told Officer Bukovic that she felt threatened when Paul approached her, June called Johnson a liar and denied that Paul ever threatened her. Bukovic, dep. tr. 46-50; Johnson, dep. tr. 59-60; June, dep. tr. 48. June's voice was raised and she was upset and inconsolable. Johnson, dep. tr. 61; Katsaros, dep. tr. 39. June blurted out that Johnson was lying at least twice. Bukovic, dep. tr. 55-56.

Response: Admit.

53.1 As Johnson was relaying the story to Officer Bukovic, June kept interrupting. Johnson, dep. tr 57-58; Bukovic, dept r. 47; June, dep. tr. 45-48; Paul, dep. tr. 63-64. officer Bukovic was standing next to June as he was speaking to Johnson. Paul, dep. tr. 60-62. June made a gesture to get Officer Bukovic's attention, but he turned to her and said, "Hold on a minute. Please don't touch me. Just let this (sic) finish and then we'll move on," or "then we'll talk to you." Johnson, dep. tr. 57-58.

Response: Admit.

54. Officer Bukovic told June that he needed to get Johnson's side of the story andthat he would give her a moment and see what she had to say and then he would get June's sidein a moment. Bukovic, dep. tr. 50-51, 55.

Response: Admit.

55. Officer Bukovic spoke to Paul next. Bukovic, dep. tr. 56-57. Paul explained that he had received a cut on the arm as a result of brushing up against a fire box. Bukovic, dep. tr. 56-57, 86-87. Officer Bukovic went out to the sales floor to examine the box. Bukovic, dep. tr. 86-87.

Response: Admit.

56. Paul also explained that he was hard of hearing and has difficulty speaking. Bukovic, dep. tr. 56-57. Officer Bukovic observed that Paul was adamant, vocal, loud and used his hands to explain his situation. Id. Officer Bukovic was aware from prior experience that hearing-impaired individuals sometimes speak with louder than normal voices (Bukovic, dep. tr. 57). Officer Bukovic explained Paul's condition to Ms. Johnson who expressed surprise at learning that information. Bukovic, dep. tr. 57-58. Even so, Johnson stated that she had felt threatened by Paul. Bukovic, dep. tr. 58-59. Officer Bukovic found Johnson to be credible and thought that Johnson believed that she had felt threatened. Bukovic, dep. tr. 59-62.

Response: Defendants deny the assertion that Officer Bukovic was aware from prior experience that hearing-impaired individuals speak with louder than normal voices because it is not supported in the record cited to by Plaintiff and, therefore, this assertion should be stricken. Defendants admit the remaining assertions in Paragraph 56.

57. Next, Officer Bukovic spoke to June. Bukovic, dep. tr. 64-65. According to the Officer, June would not explain what had happened. All she wanted to do was discuss how Johnson was a liar. Id. June was loud and boisterous, and by this time, she was no longer talking to Officer Bukovic. Instead, she was talking in general so everyone could hear what she had to say. Id.

Response: Admit.

57.1 Officer Bukovic testified that notwithstanding June being loud and boisterous, he had no grounds to arrest her for the offense of disorderly conduct because (1) he was not"alarmed or disturbed" or felt there was any "breach of the peace" and (2) no Wal-Mart representative had sworn out a criminal complaint against her. (Bukovic, dep. tr. 67-69)

Response: Defendants deny that Officer Bukovic did not feel that there was any "breach of the peace." This assertion is not supported by the record. Defendants admit the remaining assertions in Paragraph 57.1. Adding further, Defendants state that Officer Bukovic could not arrest any citizen for disorderly conduct if the disorderly

conduct was directed at him because police officers can not be the victims of disorderly conduct. Only private citizens can be the victims of disorderly conduct. (See, Bukovic dep. tr. 68).

58. Officer Bukovic asked June for her driver's license so that he could determine who he was dealing with. Bukovic, dep. tr. 65-66; Stutte, dep. tr. 32. June inquired why he needed her driver's license as she was not involved in any part of the incident whereby Johnson was accusing her son Paul of threatening her. Id.; police report. In response, Officer Bukovic told Johnson what June said and asked Johnson what she wanted the officers to do. Id.

Response: Admit.

59. Johnson told Officer Bukovic that Paul could stay and complete his statement, but that June had to leave the store because she was being disruptive. Bukovic, dep. tr. 66-67; Paul, dep. tr. 66-67. Officer Bukovic told June that the management of Wal-Mart did not want her in the store, and that she needed to leave. Bukovic, dep. tr. 69-70; Stutte, dep. tr. 29. Officer Bukovic told June that if she refused to leave, he could arrest her for trespass. Bukovic, dep. tr.70-75; Paul, dep. tr. 66-67.

Response: Admit.

60. June retorted that "this was crazy" and that she was not leaving. Bukovic, dep. tr. 75, concerned that her handicapped son had not yet completed his statement, June, dep. tr. 47; see also, point 68-69, *infra*]. Officer Bukovic tried three or more times to

convince June to leave the store, and each time she refused. Bukovic, dep. tr. 75-76; Stutte, dep. tr. 31-32

Response: Admit.

60.1 Notwithstanding her refusals, at no point in time did Officer Bukovic place Mrs. Carlson under arrest for criminal trespass. (Bukovic, dep. tr. 75).

Response: Admit.

61. As Officer Bukovic made his last request, he reached for June's right arm with both of his hands, placing one hand on her forearm and one hand on her upper arm. Bukovic, dep. tr. 76-77, 108-09; police report; Katsaros statement. Officer Bukovic touched June's arms in a calm escorting gesture. Katsaros, dep. tr. 60-64; Katsaros statement. According to one Wal-Mart employees, Officer Bukovic touched June's arms in a calm escorting gesture. Katsaros, dep. tr. 60-64; Katsaros statement. It was an attempt to guide June out of the store as if one was assisting a mother or grandmother in a parking lot in inclement weather. Stutte, dep. tr. 35.

Response: Admit.

62. When Officer Bukovic took hold of her, June "freaked out"—she began to flail her arms, get louder and said, "let go of me!" or "don't touch me!" Bukovic, dep. tr. 76-77; Paul, dep. tr. 72. Officer Bukovic grabbed onto one or both of her arms to prevent her from striking him and at the same time trying to get her to calm down. Id. June had put her hands up and crossed her arms in front of her chest. Paul, dep. tr. 73-74. In the process, June's arms had been pushed

and pulled against her chest. Paul, dep. tr. 75; June, dep. tr. 53-55.

Response: Admit.

63. Paul then came over to assist, and told his mother that she needed to calm down and that she should just leave the store. Bukovic, dep. tr. 77; Paul, dep. tr. 82-83; Katsaros, dep. tr. 54-55. At that point, June was still upset, but she had settled down physically. Id. Because Paul had gotten her to calm down, Officer Bukovic let go of June. Id.

Response: Admit.

64. According to Officer Bukovic, he held onto June for no more than five seconds. Bukovic, dep. tr. 78. Officer Bukovic never handcuffed June or told her that she would be handcuffed. June, dep. tr. 75; Paul, dep. tr. 74. June was never placed under arrest. Katsaros, dep.tr. 93-94.

Response: Admit.

65. June complained that she had high blood pressure and a wheel chair was brought for her to sit in. Paul, dep. tr. 85-88; June, dep. tr. 65; Bukovic, dep. tr. 82. Officer Bukovic asked June if she needed any medical assistance but she refused to acknowledge him. Bukovic, dep. tr. 82-83; Paul, dep. tr. 91-92. June refused any medical treatment, including summoning an ambulance. Id. But was placed in the wheelchair and was taken by Paul to the Hinsdale Hospital Emergency Room ("ER"), after stopping at their Hinsdale home to change her garments soiled from involuntary urination (June Carlson dep., Exhibit 4)

and reporting the incident to the Hinsdale Police Department (June Carlson dep ex. #2). The ER reported her blood pressure as 192 over 78 with a pulse of 103 at 7:42 p.m. and as 148 over 88 with a pulse of 78 at 10:15 p.m. (Plaintiffs Rule 26(a)(1) document #022 attached hereto as Exhibit 1).

Response: Admit.

66. [Not Used]

67. Paul pushed her in the wheelchair out of the store while the two officers followed and placed her in his vehicle. Paul, dep. tr. 93-94.

Response: Admit.

68-69. Paul returned to the store to complete his report and pay for items that he and his mother gathered in the store for purchase. Paul, dep. tr. 102-105. after purchasing the items, Paul was given a receipt that was dated January 3, 2005 with a time of 5:40 p.m. Paul, dep. tr. 105; store receipt, attached as Exhibit P to Defendant's Statement of Facts.

Response: Admit.

69.1 Following the incident, Officer Bukovic prepared and submitted a "Darien Police Department Resistance Response Report" attached hereto as Exhibit 2. the report states that June Carlson sustained "Minor Visible Injury (redness, swelling abrasion). No Medical Treatment Required." Officer Bukovic testified that as a result of the incident, June Carlson sustained redness to her left wrist (Bukovic, dep. tr. 105, 106).

Response: Admit.

70-93 [Not Used]

Respectfully submitted,

SCOTT BUKOVIC and CITY OF DARIEN

s/Laura L. Scarry
By: One of Their Attorneys

James L. DeAno #6180161
Laura L. Scarry #6231266
DeANO & SCARRY
53 W. Jackson Blvd.
Suite 1062
Chicago, IL 60604
Tel: (630) 690-2800
Fax: (312) 564-4125